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IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF ILLINOIS  
EASTERN DIVISION

IN RE:

DEALER MANAGEMENT SYSTEMS  
ANTITRUST LITIGATION,

) Case No. 18 CV 000864  
)  
) Chicago, Illinois  
) June 25, 2020  
) 10:35 a.m.

TRANSCRIPT OF PROCEEDINGS  
BEFORE THE HONORABLE JEFFREY T. GILBERT, MAGISTRATE JUDGE

TELEPHONIC APPEARANCES:

For Plaintiff  
Authenticom:

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**\*\*PLEASE NOTIFY OF INCORRECT SPEAKER IDENTIFICATION\*\***  
**NOTE: FAILURE TO STAND NEAR THE MICROPHONE OR USING**  
**A SPEAKERPHONE MAKES PORTIONS UNINTELLIGIBLE AND**  
**INAUDIBLE**

1 APPEARANCES: (Continued)

2 For Defendant Reynolds  
3 And Reynolds Company:

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21 Transcriber:

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1 (Proceedings heard in open court:)

2 THE COURT: (Inaudible) I'd like to get appearances  
3 on the Liberty system. I'd like to get appearances, and I  
4 want you to try and remember, please, when you speak, when the  
5 attorneys speak, say your name so that if somebody gets this  
6 hearing transcribed, the court reporter will have a better  
7 idea of who to attribute comments to.

8 So let's start with plaintiff Authenticom and start  
9 on the plaintiffs' side, and then we'll do the defense side.

10 MR. DORRIS: Good morning, your Honor. This is Dan  
11 Dorris on behalf of Authenticom.

12 THE COURT: Okay.

13 MR. HO: Good morning, Judge Gilbert. This is Derek  
14 Ho also from Kellogg Hansen also for Authenticom.

15 THE COURT: On the defense side?

16 (Phone dialing.)

17 MR. MacDONALD: (Inaudible) This is Ross MacDonald on  
18 behalf of The Reynolds and Reynolds Company.

19 I believe also on the line are Brian Ross, Aundrea  
20 Gulley also from Gibbs & Bruns also on behalf of The Reynolds  
21 and Reynolds Company.

22 THE COURT: Okay. On behalf of CDK?

23 (Phone interruption).

24 MR. PROVANCE: Good morning, your Honor. Matt  
25 Provance, Mayer Brown for CDK, and with me (inaudible).

1 THE COURT: Okay. I don't know what's going on here.  
2 If somebody is trying to join the call on a cell phone or it's  
3 noisy, please mute yourself. I'll go for appearances again in  
4 a second, but Mr. Provance, why don't you finish your  
5 appearance. And anybody else, we've got some interference  
6 here, please mute yourself.

7 MR. PROVANCE: Your Honor, this is Matt Provance,  
8 Mayer Brown, for CDK Global, and with me is my colleague,  
9 Britt Miller also from Mayer Brown.

10 THE COURT: Okay. I got appearances for the  
11 plaintiff Authenticom, Dan Dorris and Derek Ho.

12 Anybody else join who wants to state an appearance on  
13 the plaintiffs' side here?

14 Okay. Anybody on the defense side?

15 Okay. So based on the number -- I mean, I didn't  
16 count everybody off, but there may be people on the line who  
17 aren't stating their appearances, which is fine, it's a public  
18 hearing. I would ask, because we're getting some of that  
19 interference, that if you're not speaking, please mute  
20 yourself so we don't get a lot of static or interference.

21 Again, as I said at the beginning, if you speak,  
22 please identify yourself first so that if the hearing is  
23 transcribed, the court reporter can put names to statements.

24 Okay. This is -- we're here on plaintiffs' motion to  
25 clarify and reconsider my June 8th, 2020 order. I read

1 plaintiffs' motion. I also read the hurry-up response --  
2 sorry about that -- filed by CDK and Reynolds and Reynolds,  
3 and I understand what you guys are talking about.

4 I'm going to grant the motion to clarify, deny the  
5 motion to reconsider, try and clarify some things and provide  
6 a little guidance here.

7 One, we could not figure out -- and by we, I say me  
8 and my law clerk who's also on the line, I know she dialed in  
9 as well -- could not figure out from the written submissions  
10 what document -- what documents were being withheld on the  
11 basis of work product, either alone or in combination with an  
12 attorney-client privilege, and I recognize this motion sat for  
13 a long time, and maybe too long; I apologize for that. A lot  
14 of that's on me.

15 There were some of these motions that had  
16 supplements, but I'm not sure if this was one or not, and I  
17 really didn't want to have yet another submission after you  
18 had submitted the stuff here, but I will tell you, we weren't  
19 able to figure that out as you can see in my order.

20 To clarify, I did not intend for Authenticom to  
21 produce documents right now that were covered by the  
22 work-product privilege -- for documents that I said there's no  
23 attorney-client privilege but there was an assertion of the  
24 work-product privilege, I did not intend to overrule that  
25 privilege in my -- in my opinion because I couldn't address it

1 really as to which documents were involved.

2 Now I have a much better idea of which documents are  
3 involved, and I can address it.

4 Also, frankly, when we were reading the briefs, I  
5 thought a little bit, I don't mean to be disrespectful here,  
6 but I thought the work product arguments were a little bit  
7 more of a throw-away argument, or at least they were not  
8 developed in the same detail that the common interest or  
9 attorney-client privilege arguments were developed, so it  
10 just -- it seemed to me that they were a little bit to the  
11 right of the decimal point.

12 But I did mean for Authenticom to produce common  
13 interest documents or alleged or asserted common interest  
14 documents for which I said there was no privilege, but I  
15 realized that for some of those, I probably had to deal with  
16 the work-product argument, but I didn't really know which ones  
17 I had to deal with that argument for, if that makes sense.

18 And I wasn't going to issue kind of a blanket ruling  
19 on work product without being able to understand exactly what  
20 was happening.

21 I do think that after I give you a clarification here  
22 though, I'd like Authenticom to produce the documents as soon  
23 as possible that need to be produced.

24 You saw in -- you know, my process was I was going to  
25 look at some documents, analyze them and try and give you some

1 sense of how I was analyzing them for privilege, and then it  
2 was going to be up to the party withholding to go through the  
3 documents and see whether or not the other documents that are  
4 being withheld really should be in the same category of the  
5 ones where I said there's no privilege applying and produce  
6 those documents.

7 I can't get a sense from these briefs as to whether  
8 or not that process is going to go forward or not, so I'd kind  
9 of like to know that.

10 But I have looked now at the 17 documents that I now  
11 understand were among the 35 or 38, depending upon what time  
12 you look at this, that Authenticom was asserting the attorney  
13 work-product privilege on, and I really, on those documents,  
14 having looked at them with a work-product lens as opposed to  
15 an attorney-client privilege lens or common-interest lens,  
16 none of those documents is covered by the work-product  
17 privilege.

18 There are a lot of reasons for that. The -- you  
19 know, No. 1, I guess, if you want to be formal about this,  
20 it's Authenticom's burden to establish the existence of the  
21 privilege, and the briefs really didn't do that; 2, though,  
22 now that I'm looking at those, the documents had to be  
23 prepared by or for the party in anticipation of litigation or  
24 for trial, and litigation has to be imminent or reasonably  
25 imminent when you're looking at the attorney work-product

1 privilege.

2 And I don't think the record establishes that from  
3 these documents. These are shared among the group. You know,  
4 sometimes more or less people that Authenticom said was in a  
5 common interest group, which is an argument that I have  
6 rejected.

7 Most of these documents are in 2016, which is, as I  
8 understand it, at least two years before litigation was filed.  
9 I looked particularly at the document that was referenced in  
10 the briefs, which is Document 1103, AUTH\_MDL\_TRIV\_1103. I'm  
11 familiar with this document from looking at it before. This  
12 is communications between a lawyer Cooley, who I think at the  
13 time was engaged in some capacity of representing Authenticom,  
14 and Gerchen Keller.

15 Gerchen Keller was, as I understand it, a litigation  
16 finance firm that Authenticom was talking to about potentially  
17 financing litigation, and in that context, the lawyer is  
18 responding, and there's a whole bunch of other emails like  
19 this that I dealt with in my opinion, is responding to the  
20 questions of an analyst that Gerchen Keller is trying to get a  
21 handle on, any number of issues in a claim that Authenticom  
22 may file in the future, and this particular document talks  
23 about valuation methodologies for purposes of damages.

24 I mean, this is the closest document frankly in your  
25 pile, but I look at this document as being prepared primarily



1 for the purposes of a financial transaction between -- or a  
2 potential financial transaction between Gerchen Keller and  
3 Authenticom, not in anticipation of litigation or in imminent  
4 anticipation of litigation.

5 I understand that the whole financing transaction was  
6 in the context of potentially providing financing for  
7 litigation. It ends up being filed two years later. But this  
8 was not a litigation document or in anticipation of litigation  
9 document per se. It was really in anticipation of a financing  
10 transaction.

11 Again, a financing transaction that, if it went  
12 through, and I don't know if it went through or not, would  
13 have been used to finance some kind of litigation. But  
14 reading all these documents, the nature of the litigation, the  
15 claims, who would be involved, who would the defendants be was  
16 in flux at this time. One of the potential defendants, as I  
17 said in my opinion, was SIS, which, you know, was a purported  
18 member of the common interest group.

19 So I don't think this fits within what I would  
20 understand to be work product, which is material prepared by  
21 or for the lawyer or a lawyer's representative in anticipation  
22 of litigation, and with litigation being imminent or imminent  
23 as the case law defines it, or adversarial proceedings, and  
24 the burden on establishing that is on the proponent of  
25 withholding the document.

1           And -- I'm going to stop right away, and then I'll  
2 hear from somebody who wants to say something, but that's  
3 pretty much the analysis that I have on all 17 of these  
4 documents. They just don't seem to me to fit within the  
5 work-product box.

6           I was going to ask Authenticom if there was some  
7 briefing specific in the briefs that you filed on the motion  
8 itself that dealt with this particular document. You could  
9 point me to the brief by ECF number and page number because I  
10 really don't know that I saw your argument there, as opposed  
11 to kind of going, as I said, kind of a side argument on work  
12 product.

13           I'm going to say one more thing, and then I'll stop  
14 just so you can hear where I'm coming from on these things.

15           So I think the 17 documents that I've looked at  
16 should be produced and there's no grounds to withhold them. I  
17 understand there's about 18 other documents.

18           To me, the same kind of analysis applies. If they're  
19 in the same genre of these, and, you know, there's really  
20 nothing different between those documents and these 17, I  
21 would say those documents have to be produced, too.

22           I don't want to necessarily have to review 18 more  
23 documents. If Authenticom wants to get them to me quickly so  
24 I can review them, fine. You know, I don't think I need to  
25 review them. It's the same stuff that I'm looking at here,

1 just different emails on different dates talking about similar  
2 things, but I don't want to preclude you from getting --  
3 having me see if you think there's some difference here.

4 If you are willing to live with my ruling here or,  
5 you know, or even appeal it on this, on the whole basis of  
6 this, I would say the 18, if they look like this, also should  
7 be produced, and I would want to set a date for the production  
8 of the documents.

9 Okay. Let me stop. And I heard people trying to say  
10 something, and I will hear from Authenticom or anybody else  
11 that needs to be heard from on this.

12 MR. DORRIS: Your Honor, this is Dan Dorris from  
13 Authenticom.

14 And I just wanted to address those two documents in  
15 terms of the specific briefing where they were addressed. The  
16 arguments we presented were necessarily in response to the  
17 arguments that defendants made in their motion to compel, and  
18 I think as this Court noted in its motion to compel, the  
19 arguments were made very generally, and the arguments  
20 presented to this Court that these documents were not made for  
21 or by Authenticom, and we responded to that argument  
22 specifically, not necessarily providing all of the context  
23 around the documents.

24 I can say for these two specifically, I think it  
25 would be helpful for the Court to know more context, which it

1 asked for in its order, and the timeline I think is important  
2 here, and it may not be perfectly clear from the briefing.

3           The Authenticom suit was filed in July 2017, just a  
4 couple months after that document you're referencing, and if  
5 the Court -- another document that was submitted to the Court  
6 *in camera* I think establishes quite clearly that there was  
7 already contemplated litigation they were discussing, that's  
8 PRIV\_1103. That's one of the 17 documents, and it references  
9 a complaint that is already drafted, and that's in  
10 October 2016, and that's true for every document at issue.  
11 They all occur or almost all of them occur in the fall of 2016  
12 after this contemplated litigation. There may be one or two  
13 that are a couple months earlier in July or August that are  
14 more prefatory to what I just mentioned.

15           So I think the timeline is important, and the context  
16 may not be clear to the Court, and I'm not sure whether you  
17 would like additional information on this or if you consider  
18 your ruling final; but I think that the important thing is  
19 that the litigation was quite concretely anticipated, and they  
20 were discussing actual litigation and which was filed just  
21 months later.

22           And in response to this being primarily a commercial  
23 transaction, I think the way we view how these documents were  
24 created is the attorneys, and you referenced Marc Schildkraut  
25 who was representing Authenticom at the time, developed his

1 own mental impressions of litigation. That is work product.  
2 His analysis of what you mentioned, the valuation, and then he  
3 shared that with a third party.

4 So his mental impression of valuation, that is work  
5 product. The question for the Court is whether the sharing of  
6 that with a third party waived that privilege, and we think  
7 the Court laid out the proper standard in its opinion, which  
8 is whether it substantially increased the ability for  
9 adversaries to get that information, and we submit that it  
10 didn't because it was shared in confidence with a third party  
11 as part of the financing transaction.

12 But the mental impression itself was necessarily  
13 created towards the litigation.

14 So I'll stop there for those two documents. There's  
15 a similar argument for all of the other 17, and I guess I'd  
16 look for guidance from you whether you were interested in  
17 hearing more or whether you consider that ruling final.

18 THE COURT: I think I need a little bit of a  
19 clarification here. First of all, you referenced two  
20 documents. I'm not sure what you mean. Are you referencing  
21 the two emails that are included in document PRIV\_1103, which  
22 I have in front of me, or is there something else you're  
23 talking about in terms of two documents?

24 MR. DORRIS: The two documents at issue are 163,  
25 which you discussed specifically -- maybe I have these mixed

1 up. My apologies.

2 I'm not sure I've got -- the two documents at issue  
3 are 163 and 1103. I may have mixed up which one's which.

4 THE COURT: 1103, 1103 has two emails -- actually  
5 three emails, the lawyer at Cooley is sending some  
6 spreadsheets to Gerchen Keller and Gerchen Keller asks a  
7 question on damages, and then the lawyer responds by sending  
8 essentially an excerpt from an ABA publication on antitrust  
9 damages.

10 That one, per se, doesn't reference a complaint being  
11 drafted or anything else, so --

12 MR. DORRIS: Right.

13 THE COURT: -- maybe you're talking about a 163  
14 document, and I've got to find that one before I --

15 MR. DORRIS: Yes.

16 THE COURT: Do you know what exhibit that was to the  
17 compendium of documents you sent?

18 MR. DORRIS: I do not know --

19 MS. COOK: Judge --

20 THE COURT: Maybe my law clerk knows, yeah.

21 MS. COOK: Yeah, it's at defendants' selection,  
22 common interest Tab 2.

23 THE COURT: Got it. Okay. Let me look at that.  
24 Yep, I got it, okay.

25 MR. DORRIS: And I'm referencing the second email

1 from the bottom.

2 THE COURT: Mm-hmm.

3 Did you know, it says, are you making progress or  
4 (inaudible). I wonder because I planned to call you at 4:30  
5 Eastern this afternoon?

6 MR. DORRIS: Trying not to disclose too much --

7 THE COURT: No, I know. The one below that? Okay.

8 MR. DORRIS: Again, I was referencing this document  
9 for the purpose of showing that the litigation was not only  
10 contemplated but was in process as of October 2016.

11 THE COURT: Okay. And I disclosed that assertedly  
12 privileged information (inaudible) brief because, you know, an  
13 email that says I'll call after this, I'm not sure how this  
14 fits into attorney work product, but I'll leave that aside.  
15 I've been looking at the one at the bottom of that page and  
16 the other one that you did say on the record one of these  
17 emails references the complaint, and that's what you're  
18 talking about on Page 2 of this document, right?

19 MR. DORRIS: Yes.

20 THE COURT: And what was Cooley's role at this point.

21 MR. DORRIS: At this point, Mr. Schildkraut was  
22 Authenticom counsel for what became this litigation, so he was  
23 acting as counsel for this litigation.

24 THE COURT: And it's Cooley that was drafting the  
25 complaint, or you don't want to say?

1 MR. DORRIS: Your Honor, I just don't know the answer  
2 to that question. I --

3 THE COURT: That's fine.

4 MR. DORRIS: I don't know who drafted it, but I could  
5 figure it out if it was important to the Court.

6 THE COURT: Yeah, yeah, yeah. Okay.

7 MR. MacDONALD: Your Honor, this is Ross MacDonald at  
8 Gibbs & Bruns for the Reynolds and Reynolds Company.

9 Just to clarify something about Cooley, Cooley also  
10 represents or has represented in the past Dominion Enterprises  
11 and has represented them in this litigation, and they've been  
12 deposed as a third-party witness.

13 So I obviously don't have the benefit of seeing the  
14 documents in front of me, but I want to clarify that, you  
15 know, just because Authenticom at one point had considered  
16 retaining Cooley or briefly did retain Cooley just on the  
17 emails that both Dominion and Authenticom, he was acting in  
18 his capacity as an attorney for Authenticom and not Dominion.

19 THE COURT: Yeah.

20 I have to say -- I hear -- okay. I appreciate your  
21 clarification, Mr. Dorris. I really do. You know, and the  
22 context helps in all of these discussions, and, you know, the  
23 context that you provided is helpful, and I looked at both of  
24 these documents that you're referencing here.

25 I still don't think this moves the needle for me, and



1 I will tell you why. I guess I could talk about both of these  
2 together, 163 and 1103.

3 The context of these discussions were discussions or  
4 communications between a lawyer you say for Authenticom, and  
5 I'll accept that at this point, but maybe for other parties as  
6 well, and a firm that Authenticom was attempting to engage or  
7 talking about engaging to lend money in a transaction, the  
8 money -- I get it because it's a litigation finance firm,  
9 which is the way it's been described, would be used in some  
10 way to fund litigation that Authenticom was contemplating at  
11 that point.

12 I'm still not sure from anything what that litigation  
13 was and how close the -- it resembled the litigation that  
14 we're talking about here. But let's assume that it has some  
15 relation to this.

16 The October email is nine months before this. The  
17 other ones are six, seven months before this, and Gerchen  
18 Keller is a party on the other side of the transaction, and  
19 the lawyer is responding to some of Gerchen Keller's  
20 questions. I'm not sure how much -- let me just finish -- how  
21 much in the western world depends on some of these  
22 communications, but to me, I don't know how closely the  
23 litigation that they were talking about resembles this, how  
24 many parties were on the plaintiffs' side versus what actually  
25 got filed.

1 I look at this as communications between people who  
2 were trying to do a business deal together, so they're in  
3 essentially the course of business, not the course of  
4 litigation.

5 Litigation eventually got filed. I don't know  
6 whether Keller -- Gerchen Keller actually provided litigation  
7 financing or not, but this was in the context of a lending  
8 transaction, and I look at work product more in the context of  
9 more closely related to litigation or the context of  
10 litigation.

11 These folks at this point are not aligned. They're  
12 actually on opposite sides of a business transaction. And to  
13 me, this doesn't fit in the work product box, either 1103 or  
14 163. And, you know, that goes in more -- you know, in spades  
15 for some of these other communications. I view it, frankly,  
16 you know, even if the work-product privilege applies here, I'm  
17 not sure why it would in terms of some of the content of the  
18 other 17 documents that I've looked at, but I -- my call in  
19 looking at these 17, including 163 and 1103, that they're not  
20 covered by the work product doctrine.

21 Somebody wanted to say something? I don't know if it  
22 was Mr. Ho.

23 MR. DORRIS: Yeah, your Honor, it was Mr. Dorris.

24 THE COURT: Dorris?

25 MR. DORRIS: Yeah, two brief points.

1           One, the litigation that is being discussed is not  
2 just kind of related. It is the same thing. It really is  
3 referencing the complaint that was also filed six, nine months  
4 later, maybe not the specific complaint, but the litigation.

5           THE COURT: Let me ask you a question -- I'm going to  
6 interrupt you there because I'd like a little bit more detail  
7 on that if you can tell me.

8           The complaint that's being referenced, is Authenticom  
9 a named plaintiff? Is it the only named plaintiff? Is it  
10 against only the defendants who were sued in this case? Is it  
11 against other defendants? Are there other named plaintiffs in  
12 there with different claims? How do the claims that were  
13 ultimately filed relate to this draft complaint back in  
14 October of 2016?

15           I don't want you to -- and -- I don't want to put you  
16 in a position of disclosing anything that you can't disclose.  
17 Potentially we can, if you're disclosing information that you  
18 say is confidential, we could seal this transcript, but  
19 that's -- you know, I wouldn't mind having some of that  
20 additional -- different information, some of that information.

21           MR. DORRIS: I don't have at my fingertips the  
22 specific details in the earlier complaints. I can say that  
23 the gist of the complaint, the complaint and the harm that was  
24 being attempted to be addressed by Authenticom is the same  
25 thing that's now at issue in this litigation. That's what I'm

1 referring to.

2 I have suspicions, but I wouldn't want to say  
3 anything about that draft complaint without going back and  
4 reviewing that specific complaint.

5 The other point briefly is I would refer the Court to  
6 the cases cited in our brief. That's ECF No. 571, Page 15,  
7 footnote 11, and there are several cases there cited. I think  
8 a lot of courts, including courts in this district, accept  
9 that an attorney's mental impressions developed about  
10 litigation shared with litigation financing firms are --  
11 remain protected work product, and --

12 THE COURT: Let me --

13 MR. DORRIS: I just think --

14 THE COURT: I want to get to that document that  
15 you're talking about. Hold on for one second.

16 571 at Page 15, footnote 11.

17 MR. DORRIS: At Page 14, footnote 11.

18 THE COURT: 14.

19 MR. DORRIS: Or 15 of the ECF header, 14 of the  
20 brief.

21 THE COURT: Okay.

22 (Pause.)

23 THE COURT: Okay. I see that. Go ahead.

24 MR. DORRIS: And they just stand for the principle  
25 that I was stating, which is in this case, an attorney

1 developed his mental impressions about litigation that was  
2 concretely anticipated and ultimately filed months later, and  
3 so that is protected work product.

4           When he communicates that to a third party, the  
5 analysis is whether that communication was a waiver, whether  
6 it substantially increased the risk that the adversaries here  
7 would get that information, and because these were  
8 confidential discussions between Authenticom and Gerchen  
9 Keller, there was no material increase in risk or any increase  
10 in risk that third parties would get Authenticom's counsel's  
11 mental impression.

12           THE COURT: Okay.

13           MR. MacDONALD: And --

14           THE COURT: Go ahead.

15           MR. MacDONALD: Your Honor, Ross MacDonald again.

16           And, you know, defendants also in the brief cited at  
17 least a couple cases that suggest the opposite. The Viamedia  
18 case that plaintiffs cited is at least a waiver question case,  
19 but I think the issue comes down to in these cases to explain  
20 why some rules that litigation finance documents are not  
21 privileged and some courts come out the other way is really to  
22 look at what you were talking about earlier, which is was the  
23 document created for Authenticom or was it created for Gerchen  
24 Keller?

25           And obviously we don't have -- that's step one, and

1 there's also step two, which is is it sort of a dual purpose  
2 document that may have a purpose that's related to litigation  
3 but also has an ancillary purpose or separate purpose that's  
4 not related to litigation.

5 Obviously, we don't have the documents in front of  
6 us, so I can't answer those questions, but judging from some  
7 of your Honor's comments, it sounds to me like the  
8 communications are really for the benefit of Gerchen Keller.  
9 They're trying to answer Gerchen Keller's questions. They're  
10 providing advice to Gerchen Keller rather than being a  
11 document that was created for Authenticom, which is I think  
12 the key distinction.

13 THE COURT: What if they've providing --

14 MR. DORRIS: Your Honor --

15 THE COURT: Hold on for one second.

16 This is Gilbert for the transcript.

17 What if they're creating -- what if the document was  
18 created for the purpose of helping Gerchen Keller evaluate  
19 whether it wanted to loan money to Authenticom for purposes of  
20 litigation financing and the lawyers' purpose in doing that  
21 was to help Authenticom get such financing?

22 MR. DORRIS: Your Honor, this is Dan Dorris, and I  
23 think that's one way, the way you just described it and hold  
24 these --

25 THE COURT: No, wait.

1 MR. DORRIS: -- to be privileged, but I think the  
2 more fundamental way is that it's not about this specific  
3 email. This specific email that was sent for Gerchen Keller  
4 was created for Gerchen Keller, and I think that's evident  
5 from the document, but the analysis is what matters. The work  
6 product analysis is Authenticom's counsel's own work product  
7 analysis of damages and relevant markets issued.

8 He developed that analysis as his counsel for  
9 Authenticom in preparing for litigation. That analysis was  
10 created by Authenticom's counsel for Authenticom in litigation  
11 that was filed.

12 That's the important part. The email -- when the  
13 email was shared, the only question is waiver. The correct  
14 lens isn't to look at whether this specific email was created  
15 for Gerchen Keller. It's who the analysis was created for  
16 contained within the email.

17 THE COURT: So you're -- you're saying there's no  
18 question these documents were created for Gerchen Keller, but  
19 that's not necessarily relevant. What you're saying is the  
20 emails contain mental impressions by the lawyer, a lawyer for  
21 Authenticom, that's attorney work product that's in  
22 anticipation of litigation, and -- and you would say even if  
23 it's in anticipation of a financing transaction to fund  
24 litigation in your footnote on almost the last page of your  
25 brief.

1           And so you would say there's no question that this is  
2     mental impressions of lawyers. The only question is waiver in  
3     giving it to Gerchen Keller to persuade them substantially  
4     improves the risk that Gerchen Keller would turn around and  
5     disclose it to defendants here.

6           I think Mr. MacDonald is just going to (inaudible)  
7     through -- he would argue there's a different analysis the  
8     Court should go through. Was this document created by the  
9     lawyer, by the lawyer or by the client at the lawyer's  
10    direction for Authenticom, which is the client here, or was it  
11    created for Gerchen Keller?

12           He would say if it was created for Gerchen Keller and  
13    not Authenticom, then it's not privileged because it's not  
14    attorney work product for Authenticom, it's attorney work  
15    product for Gerchen Keller if it's attorney work product at  
16    all.

17           You mentioned dual purpose, and I'm not sure where he  
18    lands on dual purpose documents. But, you know, we're talking  
19    about -- again, in context, we're talking about a lawyer who  
20    didn't end up filing the complaint that was contemplated  
21    nine months before the complaint was filed by another lawyer,  
22    but I hear what you're saying. At the time he did this, he  
23    was acting as counsel for Authenticom.

24           But my question was really to Mr. MacDonald the first  
25    time and you jumped in, so I'd like Mr. MacDonald's reaction



1 to what I've just said in terms of the different arguments  
2 and, you know, whether I'm getting something wrong or whether  
3 he would say plaintiffs' analysis is wrong.

4 MR. MacDONALD: Yes, your Honor. This is Ross  
5 MacDonald again.

6 I think your summary is correct. Our point is that  
7 before you get to a waiver analysis, there's a predicate  
8 question of whether a document is attorney work product. In  
9 order to be attorney work product, it has to be by or for the  
10 party claiming that it's their attorney work product made  
11 in -- and made in anticipation of litigation.

12 And the Court, as I understand it, found that these  
13 documents weren't made in anticipation of litigation, and it  
14 appears at least from what Mr. Dorris just said that they  
15 weren't made by or for Authenticom either.

16 And that's why I think there's a meaningful  
17 distinction in these cases in how this works between, you  
18 know, if a lawyer for a party sent a litigation finance  
19 company a draft pleading, that draft pleading that was created  
20 by or for the party and then it was shared with a third party,  
21 that then becomes a question of waiver.

22 But here, you have to meet that first element of was  
23 it attorney work product in the first place, and specifically  
24 was it Authenticom's attorney work product.

25 The other thing is, and I appreciate that counsel is

1 kind of making new arguments attempting to kind of introduce  
2 new evidence into the record on this hearing, but, you know,  
3 the record as it sits, there isn't evidence, you know, even  
4 who Mr. Schildkraut was working on behalf at this point in  
5 time. It seems it is Authenticom, but, you know, it's not  
6 clear to us, and also, you know, it's just -- it's difficult  
7 for us to respond to arguments on the fly without the  
8 documents and given the (inaudible) we make these arguments.

9 MR. HO: Judge Gilbert, this is Derek Ho. May I make  
10 a suggestion?

11 THE COURT: Before you make a suggestion, I have some  
12 more -- a couple more questions here that relate not just to  
13 these particular Gerchen Keller documents.

14 Katie, can you give me the tab number again or  
15 somebody give me the tab number again for 1103 because when I  
16 moved to 163, even though the other documents in here are  
17 marked with yellow tabs, I can't find that particular tab.

18 MS. COOK: Judge, it's at the end of that in  
19 defendants' selection regarding the communications with Lori  
20 Generis. It's Tab No. 7.

21 THE COURT: Got it. You're right.

22 Let me put aside the Gerchen Keller documents here  
23 for a second. What's -- what's Authenticom's arguments with  
24 respect to these other I guess there are 16 documents now that  
25 I've looked at here that generally involve communications

1 among a host of people who you said -- who you wanted to be  
2 the common interest group who I said weren't. I don't really  
3 think they contain a whole lot of legal analysis. They're  
4 sending copies of news articles where some of them are talking  
5 about what you want -- what this group wanted to -- what they  
6 wanted the FTC to do rather than litigation that any of these  
7 parties were going to be part of.

8           So why are these other documents, putting aside your  
9 Gerchen Keller documents, why would these other documents be  
10 subject to work product?

11           And, you know, I appreciate Mr. MacDonald's point  
12 incidentally that these were not exactly front and center in  
13 the briefing, and, you know, the footnote you're directing me  
14 to is on the page before your signature page, so, you know,  
15 I -- I may have 15 pages and each one of those pages was very  
16 important, but -- give me something on the other documents  
17 which I don't think are covered by work product just in terms  
18 of content as well.

19           MR. DORRIS: Yes, your Honor. This is Dan Dorris.

20           And on the waiver point, I would just reemphasize  
21 that we were responding to the arguments made by defendants in  
22 their motion to compel, which we believe also did not resolve  
23 these issues.

24           So on the specific documents, the other ones, I think  
25 a good exemplar and one that shows up several times in the

1 email chain and it shows in the first email chain, it says  
2 subject nondisclosure agreement, which confirms there was no  
3 waiver when shared with third parties and there was, in fact,  
4 a nondisclosure agreement between the parties.

5 And that email is collecting information for use in  
6 litigation and those --

7 THE COURT: Give me.

8 MR. DORRIS: -- emails follow October 16.

9 THE COURT: Give me the -- give me if you can refer  
10 if you have it, maybe you don't have it in front of you, but I  
11 have a Kellogg Hansen document or, you know, binder that was  
12 sent to me on July 2nd, 2019 under cover of a letter from  
13 Mr. Ho, and it had a bunch of tabs, plaintiffs' selections,  
14 defendants' selections on common interest or Zimmer, whatever.

15 Which tab are you looking at?

16 MR. DORRIS: Yes, your Honor, and I think a good  
17 example -- I'm trying to relay with the privilege numbers.  
18 Just give me one moment.

19 MR. MacDONALD: Your Honor, this is Ross MacDonald.

20 As Mr. Dorris searches for the number, they mentioned  
21 a nondisclosure agreement now. They had never previously made  
22 an argument that there was some nondisclosure agreement  
23 between any of these parties.

24 The witnesses, we asked about whether there were  
25 common interests or nondisclosure agreements, all said that

1 they didn't have such an agreement or weren't aware of such an  
2 agreement, as you cite in your order. So I honestly don't  
3 know what that is a reference to.

4 MR. DORRIS: This is Dan Dorris.

5 Our brief does make the point of the nondisclosure  
6 agreement. That's ECF No. 517, Page 15, footnote 12, but says  
7 certain counsel communications state they're the subject of a  
8 nondisclosure agreement and cites two documents submitted to  
9 the Court on that point *in camera*.

10 On the specific documents, so an example would be  
11 125, which was one of the 17 documents before the Court --

12 THE COURT: Okay, and can you -- you know --

13 MR. DORRIS: I'm sorry, I don't have --

14 THE COURT: Okay, wait. I found it. I found it.  
15 It's defendants' selections to common interest, Tab 1, and  
16 privileged document 125.

17 MR. DORRIS: And before we go to this document, your  
18 Honor, one suggestion I would like to make, and I think the  
19 discussions here probably shows the need for it more than  
20 anything else is that as the Court said in its order, the  
21 defendants had stated very generally their arguments for work  
22 product -- that the work product didn't exist and that the  
23 Court couldn't rule on those arguments as they were presented  
24 and it didn't have enough information.

25 And I submit that it would be more helpful for the

1 Court to come to the correct result to entertain further  
2 briefing on the issue that flushes out what the Court did not  
3 have. I'm happy to do my best to do that on the fly today,  
4 but, you know, I think written submissions would be more  
5 beneficial to the Court.

6 THE COURT: I don't know. I mean, I'm looking at  
7 this document that you say is 125. That just is not work  
8 product, okay?

9 I mean, the known lawyer mental impression thing  
10 here, this is the -- a communication among and between members  
11 of your so-called common interest group, I -- you know, I  
12 won't, you know, put in the record about what you're sending,  
13 but suffice it to say that what you're sending -- let me just  
14 make sure of my statement before I get there.

15 So do me a favor. Look at Authenticom MDL privilege  
16 125 and look at the page of that document that has numbers --  
17 Page 7 on the bottom and look at the email, the first full  
18 email on that page that is Tony Petruzzelli who's from  
19 AutoLoop. Put into the record -- do you have it?

20 MR. DORRIS: Yes. Yes, I do, your Honor.

21 THE COURT: Okay. There's a To column there, just  
22 put into the record, identify the people in the To and tell me  
23 who they are and what their privilege is.

24 MR. DORRIS: The To column is Benjamin Miller. He's  
25 an attorney at Davis Polk.

1 Steve at Authenticom would be Steve Cottrell,  
2 Authenticom's CEO.

3 Nathan Jay would be AutoLoop, a plaintiff in this  
4 litigation, the general counsel for that company.

5 Jennifer Wade was -- I apologize, I don't know her  
6 specific role but was employed by DARCARS, a dealership.

7 THE COURT: I don't think she's a lawyer. Nathan Jay  
8 guy is employed by who again did you say?

9 MR. DORRIS: AutoLoop. He's the general counsel of  
10 one of the plaintiffs in the litigation.

11 THE COURT: Right.

12 MR. DORRIS: Jennifer Wade, I'm sorry, I don't have  
13 much more than that she was --

14 THE COURT: Yeah.

15 MR. DORRIS: -- her email says DARCARS.

16 Next is Mark Queen, who was either the COO or CEO of  
17 Elead, a company that at this time was a very active  
18 participant in this common interest effort but was  
19 subsequently acquired by CDK, which naturally changed their  
20 position.

21 THE COURT: Uh-huh.

22 MR. DORRIS: Mark Kovack is an attorney at Davis  
23 Polk, and keep in mind the Davis Polk attorneys being  
24 referenced here, the Court has already denied the motion to  
25 compel as to communications with Davis Polk who were potential

1 counsel for Authenticom.

2 The next one is Jon Leibowitz, another attorney at  
3 Davis Polk.

4 And Rusty Friddell is the general counsel of one of  
5 the absent class members, Dominion.

6 THE COURT: Okay. And this communication, this 125,  
7 your argument as to why this is work product is?

8 MR. DORRIS: The first email in the chain over on the  
9 last page is an email from an attorney requesting that the  
10 people on the email chain collect facts for use in  
11 anticipation of litigation, and my estimate that this is --

12 THE COURT: Why is that in anticipation of  
13 litigation, as opposed to monitoring what are regulatory  
14 agencies doing? How are you going to be involved in  
15 litigation involving that regulatory agency?

16 MR. DORRIS: I --

17 THE COURT: Part of an effort here -- hold on, a lot  
18 of the effort was this group was to get the FTC to go after  
19 CDK and/or Reynolds, right? But you were not going to be a  
20 party to that litigation. You were going to be a bystander  
21 cheering it on, right, or AutoLoop was or DARCARS was or any  
22 of these other people were, right?

23 MR. DORRIS: And this is why the context is  
24 important, as you saw earlier the emails that at this time  
25 there was private litigation contemplated, a draft complaint



1 referenced in the earlier emails in October 2016, and so there  
2 are multiple avenues being explored here.

3 Certainly one of those is private litigation, and  
4 this document is gathering facts for use as part of those  
5 efforts, and it's the same as if an attorney outside counsel  
6 emails his client and says can you help me find these facts  
7 for use in litigation. That's work product because it exposes  
8 the attorney's mental impressions and strategy in litigation.

9 MR. MacDONALD: Your Honor, this is Ross MacDonald.

10 If I can just correct a couple things. Mr. Dorris  
11 made a comment about how Elead only left the common interest  
12 group because it was acquired by CDK. That is not accurate.  
13 Elead filed an affidavit saying they disavowed any interest in  
14 the common interest group months -- months before it was  
15 acquired by CDK, if not longer.

16 Secondly, something that your Honor just pointed out,  
17 which I think is very relevant, is that to the extent any of  
18 the asserted work product was actually in relation to an  
19 effort to lobby a government agency like the FTC, as opposed  
20 to this litigation, there is no work product protection. And  
21 we raised that argument in a brief on this issue. This is ECF  
22 585 at Page 15.

23 THE COURT: We were kind of in the middle of  
24 Mr. Dorris trying to make his case that this particular  
25 document is privileged. I mean, I see there are lawyers on

1 these things. There are a bunch of other, you know, people  
2 not affiliated with AutoLoop or Authenticom, and what about  
3 this -- this appears to be a Crain's article that is  
4 circulated, the first few pages of this thing by Petruzzelli  
5 at AutoLoop. That's work product because?

6 MR. DORRIS: As I said --

7 THE COURT: Is that a lawyer's mental impressions  
8 when some nonlawyer circulates without comment a letter from  
9 Crain's Business?

10 MR. DORRIS: Standing by itself, no, no, of course  
11 not, but when it's in response, we submit it was the response  
12 to a request for information by the attorney, and keep in mind  
13 the Court has already held that the Davis Polk attorneys  
14 requesting information were Authenticom's potential counsel at  
15 this time.

16 THE COURT: It's all -- it's all a request for  
17 information relating to potential -- the FTC potentially going  
18 after somebody else in which you guys would have a cheering  
19 interest, right?

20 MR. DORRIS: I -- I believe that, like I said, the  
21 context is important in these documents. We would submit it's  
22 work product because there were multiple angles being  
23 evaluated and pursued by the parties at this time. There was  
24 a complaint being drafted, and there were efforts on multiple  
25 fronts, and this was gathering information to further those

1 efforts.

2 THE COURT: Mm-hmm. I'm just looking again at my  
3 order of June 8th.

4 (Pause.)

5 THE COURT: Okay. Here's where I am on this,  
6 everybody.

7 When I first looked at all these things and gave you  
8 the ruling on June 8th, I wasn't able to determine from the  
9 briefs what was up really on the work product. Who takes the  
10 hit on that, Authenticom because they're raising the privilege  
11 or defendants because they're attacking it? It's really  
12 Authenticom that takes the hit on that because they're raising  
13 the privilege or trying to raise the privilege, and they've  
14 got -- they have the burden of doing so.

15 I thought the way the issues were presented to me  
16 were not -- they were not presented in the most helpful way  
17 for me to resolve particularly the work-product privilege.  
18 Part of that was just the way, kind of the two-step process  
19 that I got all these documents.

20 Should Authenticom have done a better job with it?  
21 Yes, but I need to try and turn in the right decision and not,  
22 you know, do it on points or the procedural aspects of this.

23 I don't want people to have to fly by the seat of  
24 their pants on an argument here which really is in the context  
25 of a motion to clarify what I meant about whether documents

1 that Authenticom was saying were work-product privilege had to  
2 be produced when I denied the request that they be considered  
3 to be common interest or attorney-client privilege, and the  
4 answer to that if it wasn't clear in my opinion is I knew at  
5 the time that if there were work-product objections that you  
6 guys couldn't work out based on what I said in the opinion, I  
7 was going to have to deal with the work-product issue, and it  
8 sounds like you can't work them out.

9           There are different levels in these documents. I  
10 don't think -- I don't think there's any way, shape, or form  
11 that simply a nonlawyer sending a copy of an article in the  
12 media to a bunch of people that includes lawyers is work  
13 product. I don't know whether there can be a whole lot of  
14 debate about that, and so by any stretch of the imagination,  
15 Authenticom's designation of these documents is a bit  
16 overbroad.

17           But we're doing this on the telephone during COVID  
18 time, and I want to make sure I'm making the right move here.  
19 So my call on this is that I want you to give me the 18 other  
20 documents so that this is comprehensive.

21           I don't want any more briefs. This has been helpful  
22 to me in at least giving me a sense of where each party is on  
23 the work-product issue. I'll look at those. I'll look again  
24 at the 17 with this loss that I've got here, and I'll set it  
25 for a hearing at which, whether it's in person or, again, on

1 telephone, in which I go through the documents and give you a  
2 final ruling on the work product.

3 In trying to give you a final ruling on the work  
4 product, you don't have to produce the common interest  
5 documents that are also work product. If there are  
6 attorney-client privilege documents that you can't, even if  
7 your arguments shoehorn into the work product privilege, those  
8 should be produced, you know, by next week sometime.

9 I suppose there's an option that Authenticom, after  
10 hearing this discussion, might say there are certain documents  
11 that aren't work-product privileged; but, you know, I don't  
12 know why you'd do that because you're keeping the ball in the  
13 air and while you keep the ball in the air, you don't have to  
14 produce these documents to these other guys and (inaudible) in  
15 the litigation.

16 I'm just trying to talk.

17 MR. DORRIS: This is Mr. Dorris. Sorry to interrupt  
18 that.

19 I -- I did want to raise one point. In principle, we  
20 have no objection to producing the attorney-client-only  
21 privileged documents immediately. There is one procedural  
22 issue that complicates that, and that is Authenticom still has  
23 the right to appeal. There are certain documents for which  
24 there's not an attorney-client or work product. There's  
25 certain documents for which there's both the attorney-client

1 and work-product privilege asserted.

2 We understand the Court's order with respect to the  
3 attorney-client privilege, but Authenticom may want to take an  
4 appeal of that issue for the documents for the dual privilege,  
5 and then we would ask that either the Court or the defendants  
6 provide clarity that our willingness to produce the  
7 attorney-client-only privileged documents does not in any way  
8 prejudice our ability to appeal the Court's ruling on that  
9 attorney-client issue as to the documents we have not yet  
10 produced.

11 THE COURT: Which really would be common-interest  
12 documents, or would they also be --

13 MR. DORRIS: Yeah, I mean -- right, to try to be a  
14 little more clear. There could be documents that Authenticom  
15 does want to appeal the common-interest ruling, the Court's  
16 common-interest ruling, and we wouldn't want our willingness  
17 to produce some of the documents now to prejudice our ability  
18 to bring that appeal in the future.

19 I think the appropriate way to accommodate that would  
20 be for the defendants to agree that they would not argue that  
21 our production of documents now in any way prejudices our  
22 ability to make an appeal later.

23 THE COURT: So I hear -- before I hear from  
24 Mr. MacDonald, there are certain documents you'd be prepared  
25 to produce immediately by next week, which are documents that

1 were withheld solely on the basis of the attorney-client  
2 privilege and not on the basis of the work-product privilege;  
3 but you would not want your production of those documents to  
4 prejudice your ability to appeal my ruling on the  
5 common-interest documents, and you want defendants to  
6 acknowledge that they won't argue production of assertedly  
7 attorney-client-privilege documents where I disagreed  
8 prejudices your argument that I was wrong on the  
9 common-interest privilege in whole or in part, right?

10 MR. DORRIS: That's correct.

11 THE COURT: And, Mr. MacDonald, do you want to do  
12 that, or do you want to do it in all one fell swoop because  
13 it's kind of confusing?

14 Go ahead.

15 MR. MacDonald: Yeah, this is Ross MacDonald again.

16 Just to clarify, Dan, are you suggesting that you  
17 guys next week would produce all but the 35 documents over  
18 which you're still maintaining a work-product-privilege  
19 assertion, so any documents that only had an attorney-client  
20 or only had a common-interest but didn't have a work-product  
21 privilege asserted?

22 MR. DORRIS: Yes. We would produce all of the  
23 documents where there's only an attorney-client privilege --  
24 where there was only an attorney-client privilege asserted.

25 THE COURT: Attorney-client privilege and/or common

1 interest, same thing?

2 MR. DORRIS: Yes, yes. Attorney client, common  
3 interest, no work product.

4 THE COURT: But how would your -- I'm confused  
5 because you said you would want to potentially appeal the  
6 common interest ruling, but you want to say production of  
7 common-interest documents that you're not also claiming a work  
8 product doesn't prejudice your ability to produce -- argue  
9 that the common-interest ruling was wrong?

10 I'm not sure how producing common interest -- I  
11 thought you were talking about attorney client but not common  
12 interest. I don't know if (inaudible).

13 MR. DORRIS: I think the right way to view those two  
14 privileges is they're the same. The common-interest documents  
15 are even why the attorney-client privilege is not waived, so  
16 when I group them together, I'm referring to the  
17 attorney-client privilege with the common-interest documents  
18 as a common-interest document (inaudible).

19 THE COURT: Okay. So what you want -- so what you  
20 want is defendants to agree that you're producing those  
21 documents or the attorney-client documents, which is inclusive  
22 of common-interest documents, but over which you're not also  
23 maintaining a work-product objection. If you produce all  
24 those attorney-client documents, that doesn't affect your  
25 ability to appeal the common-interest ruling even though



1 defendants already have those documents?

2 MR. DORRIS: Let me try and put this -- sorry for not  
3 explaining this as clearly as possible.

4 THE COURT: No, it's possible I'm not understanding  
5 you, and maybe my understanding doesn't matter because if  
6 Mr. MacDonald wants to agree to something, far be it from me  
7 to be the fly in the ointment.

8 So if you guys can agree and you guys want to talk on  
9 the record here, that's fine. I don't -- if I have a problem  
10 with it, I'll let you know.

11 MR. DORRIS: This is Mr. Dorris.

12 The agreement would be if we have two documents right  
13 now, one being attorney-client-only privilege asserted, the  
14 other being attorney-client plus work product, we are willing  
15 to produce the attorney-client-only privileged document  
16 because this Court has rejected that attorney-client-only  
17 document.

18 However, for the document we have not yet produced  
19 for which there was both attorney-client and work-product  
20 privilege assertion, we would like to retain the ability to  
21 appeal both the denial of work-product privilege and any  
22 denial of attorney-client privilege, and are seeking -- and  
23 are willing to make our production conditioned on defendants  
24 agreeing that the production of attorney-client-privilege-only  
25 documents does not somehow waive or foreclose our ability to

1 appeal the attorney-client-privilege issues for documents not  
2 yet produced.

3 MR. MacDONALD: Okay, Dan, this is Ross MacDonald  
4 again.

5 I can't speak for CDK because I'm not in the same  
6 room for them, but for Reynolds, our position is that on the  
7 timeliness of an appeal, appeal of the attorney-client and  
8 common-interest ruling, that deadline has passed because the  
9 order on the attorney-client and common-interest rulings was  
10 more than 14 days ago, and the motion for clarification didn't  
11 seek clarification of the attorney-client and common-interest  
12 privileges, just the work-product privilege.

13 But we can agree that the fact that you produced  
14 these documents isn't going to act -- isn't going to otherwise  
15 change your appellate rights or act as a waiver of the  
16 privileges, if that makes sense. So we're not going to argue  
17 that, oh, they've produced them; therefore, they've waived  
18 this privilege. We agree not to do that.

19 MR. DORRIS: This is Dan Dorris.

20 That's acceptable, and assuming we have the  
21 commitment from CDK, we are willing to produce those documents  
22 quickly.

23 MR. PROVANCE: Yes, this is Matt Provance for CDK.

24 Similarly, we would agree that the act of producing  
25 the documents that we've been discussing will not procedurally

1 alter the parties' positions with respect to any appeal, but  
2 we would otherwise reserve our rights in that respect.

3 THE COURT: Here's my suggestion, guys. This is  
4 Judge Gilbert.

5 Because there's a lot of lawyer talk here, I'm a  
6 lawyer, too, and maybe because I'm not in the trenches with  
7 you, I don't completely understand what you're saying.

8 I would suggest you would reduce this agreement to  
9 writing and that once you've got that agreement in writing, if  
10 it's acceptable, then Authenticom produce the documents that  
11 we're talking about here.

12 I'm not weighing in on appeal or not appeal, but I  
13 think you ought to put it on paper so that both sides are  
14 signing off on the same language, as opposed to the dueling  
15 languages that may be overlapping here. And once you've done  
16 that, Authenticom ought to produce whatever it's going to  
17 produce.

18 I don't have enough to issue an order right now on  
19 this, in other words, but I think you guys can agree to  
20 anything you want to agree to and then get the documents  
21 produced. If you do have an agreement, then they can be  
22 produced.

23 I want -- I have the 17 documents here, so I want the  
24 additional 18. There are no deliveries in the courthouse  
25 right now, so you're going to have to FedEx them to -- I think

1 you FedEx them to me, or UPS or whatever, and those go up to  
2 the clerk's office, and then they can deliver them to me or  
3 they can deliver them to chambers and I could come in.

4 Katie, lawyers --

5 MS. COOK: Yes, I think --

6 THE COURT: Lawyers, am I right, there's no hard copy  
7 deliveries right now to the district court, right?

8 MS. MILLER: You're correct, your Honor. This is  
9 Britt Miller.

10 THE COURT: Okay. So I think if you UPS them or  
11 FedEx them to me, I've gotten this before, it goes to the  
12 clerk's office, and then Tom Bruton gets it to me, and he can  
13 either get it to me at home or he can drop it off in my  
14 chambers on 13, and I'm authorized to be in court on -- in the  
15 courthouse on certain days, two days one week, three the next.  
16 I can go in and get them.

17 I'd ask you for two copies because I want to be able  
18 to review these for my law clerk, and I can do that as soon as  
19 possible. You can tell me now when you're going to do it.

20 If you can get them out today for, like, you know,  
21 Friday or Monday delivery, I'll get them quickly.

22 MR. DORRIS: And, your Honor, this is Dan Dorris.  
23 Was I correct in hearing that you didn't want any  
24 further written submissions with the 18 documents?

25 THE COURT: I don't. I really don't. I mean, I'm

1 getting where you're coming from on this, what you've been  
2 telling me is more color, and I get where CDK is coming from  
3 on this, too, and I can go back and potential -- you know, I  
4 can look at what you've said in your briefs already to  
5 (inaudible) the crutches on this.

6 Work product is not new to me, and so by now  
7 re-reviewing these documents with the additional arguments and  
8 getting together an opinion so there's no mistake on any of  
9 this, I think that's potentially consistent with what I said  
10 on June 8th, which is I can't figure this out. I'm not even  
11 sure if it's still relevant. You know, I can't make these  
12 determinations based on the briefs I got on a blanket basis,  
13 as opposed to individual documents, and if the parties can't  
14 work it out, we'll revisit it.

15 And so that's what I've done. I've granted your  
16 motion to clarify. I'll clarify my ruling on work product. I  
17 could also clarify, which is the last thing with your motion,  
18 that my June 8th order was not intended to require production  
19 of work-product-privilege documents or even as attorney-client  
20 documents that also would being withheld on the basis of work  
21 product until I got down to the nub of the matter on the work  
22 product thing.

23 So if you get this stuff to my quickly, I will -- you  
24 know, this stuff has sat for a long time. I'm sorry about it.  
25 It will sit a little more, and just trying to think if I want

1 to require you to have to brief more stuff. That's what I'm  
2 kind of mulling.

3 I mean, I think what you've given me orally gives me  
4 the gist of your positions. I mean, Mr. Dorris's explanation  
5 of all the other documents other than the Gerchen Keller, your  
6 basic position is this was a group of people who were talking  
7 about pursuing litigation anywhere from nine, ten months  
8 before to earlier, and these documents were prepared in  
9 anticipation of litigation either by a lawyer or at the  
10 lawyer's direction, and the litigation was sufficiently  
11 imminent given the timeframe we've talked about that they all  
12 should be covered, right?

13 MR. DORRIS: Yes, that's correct, that at least since  
14 the middle of 2016 and actually earlier, but the documents  
15 were all from the middle of 2016. They occurred during a  
16 period where there was concrete private litigation  
17 contemplated as well as other efforts.

18 Some of the documents that I think you will see refer  
19 to recruiting potential plaintiffs and getting plaintiffs and  
20 collecting facts for that litigation, and this is all part of  
21 the same effort that ultimately became the suit that's in the  
22 MDL.

23 THE COURT: Yeah. And Mr. MacDonald's position for  
24 the defendants, as they say in *My Cousin Vinny*, he  
25 said (inaudible) I don't want to say what he says on the

1 record, and that there's no --

2 MR. DORRIS: We've all seen it.

3 THE COURT: Yeah. It's a good movie.

4 And there's no way, given -- and you haven't seen the  
5 documents obviously, but the position of the group, you know,  
6 if it's FTC related, that's not the litigation here, and  
7 you've got, you know, this group potentially who had divergent  
8 interests, and all these people did not end up filing  
9 litigation.

10 And so this, you know, this was kind of a group of  
11 people who was talking about a bunch of stuff, but even if  
12 lawyers were involved, this is not the kind of work product or  
13 traditional work product that you would say is insulated from  
14 production, and maybe -- you could say what you really mean  
15 because I don't know that I've characterized everything you  
16 were saying right.

17 MR. MacDONALD: Your Honor, Ross MacDonald.

18 I believe you mostly characterized it correct. A  
19 couple things I would just add is that some of these documents  
20 were actually as far back as 2015.

21 THE COURT: Okay.

22 MR. MacDONALD: Go even further back, and  
23 additionally to the extent, you know, there is something that  
24 could be qualified as work product in one of these documents,  
25 it has to be Authenticom's work product to be protectable.

1           Authenticom can't assert a privilege for something  
2 that was Dominion's work product or DARCAR's work product, et  
3 cetera, et cetera.

4           THE COURT: Okay. Or AutoLoop's.

5           MR. MacDONALD: Yeah.

6           MR. DORRIS: And I believe that is covered in the  
7 briefing. The rule says by or for. If it is for Authenticom,  
8 then it is also covered under the work product rule, but those  
9 divergent positions are covered in the existing briefing  
10 before the Court.

11          THE COURT: Yeah. No, I think, look, I mean, I have  
12 enough information. We've been on for almost an hour and a  
13 half. I don't want to -- I don't want to prolong this any  
14 more.

15          I think I have what I need. I'd like the documents.  
16 Once I have those, we'll reconvene. I'll try and do it as  
17 soon as we can, and I'll be able to make, I think, a record  
18 that if you decide to appeal it, Judge Dow will have it in a  
19 better form than just the 17 documents or not, and I think  
20 that's the way to go forward.

21          So let's do that. Tell me when -- are you going to  
22 get them out today so that they're delivered tomorrow so I can  
23 get them delivered either tomorrow or Monday?

24          MR. DORRIS: Your Honor, I think the early to end of  
25 next week is probably more realistic, and the reason I say



1 that is we took your order to heart and have reviewed -- have  
2 been reviewing the documents, the remaining  
3 work-product-privilege documents, to see whether there are any  
4 that we are willing to, in light of the Court's orders,  
5 produce. And there are some, but there are also a couple that  
6 we are still trying to acquire more information to make that  
7 decision.

8           So I don't have a set of documents today. I think we  
9 will get that to you quickly and can get them out to you early  
10 to mid next week for delivery sometime this week.

11           THE COURT: Okay.

12           MR. DORRIS: The goal here is to narrow it.

13           THE COURT: Yeah. Why don't you send Brenda an  
14 email, unless Mr. MacDonald wants me to set a firm date on  
15 this, which I'd be receptive to.

16           You can send Brenda an email to say we just sent them  
17 out today for tomorrow delivery so that we can make the  
18 clerk's office aware that I'm going to get them.

19           So --

20           MR. MacDONALD: Your Honor, Ross MacDonald again.

21           I think it makes sense to set a date just so that  
22 everyone's aware of when they'll be sent, and then if  
23 Authenticom after that date decides they want to withdraw  
24 their privilege, they can obviously notify the Court and the  
25 parties.

1 THE COURT: Okay. You said middle to end of next  
2 week. Wednesday? Thursday? Can you get them out by then?

3 MR. DORRIS: Yes. We can send them out by close of  
4 business on Wednesday of next week for the earliest delivery.

5 THE COURT: Okay. We'll put that in our order.

6 And why don't you send me all 45 together, all right?  
7 They don't have to be bound. They can be -- send me two  
8 copies of that with a binder clip, staple the ones that are  
9 together, and I'll have all of them in one place rather than  
10 having to go between two binders.

11 And I'll look for them. You're not prejudicing  
12 yourselves because next week is a crazy busy week with  
13 criminal hearings.

14 Hold on for one second.

15 Yeah, I'll be off shortly.

16 Okay. Let me -- and if it's less than 35 documents,  
17 that's fine, too. I'm not going to -- I'm not going to insist  
18 that you send me 35 documents.

19 Okay. So your motion to clarify is granted, and I'll  
20 say how I clarified it. Reconsidering, I would say denied  
21 without prejudice. I don't know where that's going to go if  
22 you end up appealing whatever ruling I make.

23 You'll submit the documents, the work-product  
24 documents that are still -- for which decisions still need to  
25 be made, you'll send them by Wednesday of next week, and I

1 will get on that as soon as I can and then schedule a hearing  
2 so that we can go over the documents and I can give you a  
3 better sense, having thought about what you guys are saying  
4 and also re-reading parts of your brief and also looking at  
5 the documents again in light of this hearing.

6 Is this okay? Or not okay. Do I have to deal with  
7 anything else?

8 MR. DORRIS: Nothing from Authenticom, your Honor.

9 MR. PROVANCE: Your Honor, this is Matt Provance.  
10 May I raise just a brief housekeeping matter before we --

11 THE COURT: Sure.

12 MR. PROVANCE: CDK has a separate privilege log  
13 motion that it filed in the cases that where it is only --  
14 where it is the only defendant, and that motion is at Docket  
15 543.

16 THE COURT: Let me interrupt you. Is this the  
17 AutoLoop and Cox motion?

18 MR. PROVANCE: Yes, your Honor, that's correct.

19 THE COURT: Yeah, we're on it. I mean, I'm sorry you  
20 don't have a ruling on that now, but you're going to have a  
21 ruling -- we got interrupted on that with another case, but I  
22 know it's pending, and you're going to get something pretty  
23 darned quickly.

24 MR. PROVANCE: Thank you, your Honor.

25 I was actually just going to raise -- we had filed a

1 notice of partial resolution earlier this month, and we were  
2 not able to deliver it, but I just wanted to make sure it was  
3 received by the Court.

4 THE COURT: Yeah, we -- well, we got something.  
5 Katie, were we clear on how that dealt with things?

6 MS. COOK: Yes.

7 THE COURT: Yeah, I think that was right. I  
8 understood that.

9 MS. COOK: And we are aware of the filing, and we  
10 have it.

11 THE COURT: Right. And I believe we're going to  
12 address it in our ruling.

13 So, okay, and we didn't lose it. I know it's been  
14 pending for a while. I'm sorry, but you will hear from us  
15 quickly. I can't promise you necessarily this week, but  
16 quickly.

17 MR. PROVANCE: Thank you, your Honor.

18 THE COURT: Okay. We also know there's another one  
19 out there, right? Looking at our pending motions chart here,  
20 which I think was recently fully briefed. This is the one  
21 about the settlement agreement, right, and disclosure?

22 MR. MacDONALD: Yes, your Honor. I believe that's  
23 Reynolds' motion to compel a settlement between CDK and one of  
24 the plaintiffs in this MDL, MVSC.

25 THE COURT: Right, okay. So I'm aware of that one,

1 too.

2 All right. We're good.

3 Anything else housekeeping or otherwise?

4 No? Okay, good.

5 All right, I'll talk to you when I talk to you.

6 Thanks.

7 MR. PROVANCE: Thank you, your Honor.

8 MS. MILLER: Thank you, your Honor.

9 MR. DORRIS: Thank you.

10 (Which were all the proceedings heard.)

11 CERTIFICATE

12 I certify that the foregoing is a correct transcript from  
13 the digital recording of proceedings in the above-entitled  
14 matter to the best of my ability, given the limitations of  
15 using a digital-recording system.

16 /s/Kathleen M. Fennell

July 20, 2020

17 \_\_\_\_\_  
18 Kathleen M. Fennell  
Official Court Reporter

\_\_\_\_\_  
Date

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